Pettibone Corporation *and* Daisy Frison. Case 13-CA-18642

April 20, 1981

DECISION AND ORDER

On January 19, 1981, Administrative Law Judge Harold Bernard, Jr., issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Pettibone Corporation, Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order.

[1] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

DECISION

STATEMENT OF THE CASE

HAROLD BERNARD, JR., Administrative Law Judge: This case was heard on November 5 and 6, 1979, in Chicago, Illinois, pursuant to a complaint issued in May 1979 alleging, as later amended, that Respondent threatened employees with economic reprisals and refused reinstatement to employees because of their protected concerted activity, thereby violating Section 8(a)(1) of the National Labor Relations Act, as amended. Respondent denies the commission of any unfair labor practices.

Upon consideration of the entire record, the demeanor of the witnesses, and the briefs filed by the parties, I make the following:

FINDINGS AND CONCLUSIONS

I. JURISDICTION

The parties agree, the record shows, and I find that Respondent, a heavy industrial equipment manufacturer in Chicago, Illinois, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE UNFAIR LABOR PRACTICES

On April 5, 1979, Respondent's keypunch operator supervisor, Earline Elam, told the employees in her department that, unlike the prior year when some of the inventory work was sent out, Operations Manager Mike Lamphier wanted them to do all such work in 1979, and that the inventory cards were coming in and, due to the employees' good inventory work the previous year, he intended to assign them all the work. The keypunch operators punch documents from Respondent's factory offices, timecards, and job tickets, providing input to Respondent's computer systems. This news from Elam was greeted by the employees with some misgivings because of the difficulty arising from inaccuracies in the coding information and because the work would require substantial overtime hours. In addition, the record shows that, in their view, the keypunch employees worked in crowded, dusty, non-air-conditioned, inadequately lit, and even hazardous physical surroundings, and that the news of Lamphier's expected assignment prompted them, as a group, to request a meeting with him on the subject.

A. *The Meeting on Thursday, April 5*

Lamphier came upstairs from the computer room and met with the employees at 9:30 a.m., informing them that he had 80,000 cards he wanted punched and verified in about 2 weeks, or in approximately one-half of the time required the previous year. The employees raised objections about working conditions pointing out the lack of air-conditioning and the difficulty of doing the work in the afternoon after regular working hours. The employees also raised objections to the poorly lit surroundings in the keypunch operators' working area, and to being "hemmed in" by empty boxes resulting in narrow passageways and a partially blocked fire exit stairway. As discussion continued, employee Corene Jones asked about a raise in pay for the keypunch operators, and Lamphier replied that the employees had already gotten one in January—a reference to Respondent's granting a "government guideline"-type increase at that time—whereupon Jones told him, "We still want a raise now." Keypunch operator Barbara Thomas inquired of Lamphier, "if not a raise what about a bonus or something," referring to the fact that this was going to be extra work. When Lamphier told the employees he would "see" about getting the raise but did not think they would get one, Jones asked if there was anyone else "we could go to?" Lamphier replied, "No, I do not want you to get in any *trouble*." (Emphasis supplied.)

Lamphier returned upstairs later that afternoon, and I find from employee accounts in the face of Lamphier's substantial admissions and only partial failure to recall that he told them heatedly, at times banging on a desk, that management was angry because they asked for a raise, that they were not going to get another "damn" dime that year, and that if they did not like it that they could leave. I further find credible the testimony by Corene Jones, corroborated by Delores Jones, that Lamphier told the assembled group of keypunch operators, Corene Jones, Arline Turner, Pandora Mitchell, Delores Jones, Barbara Thomas, and Daisy Frison: "[H]e was red

[faced] and he also said that when it came time for our [salary] review that it would go against us." Supervisor Elam's testimony supported employee accounts that Lamphier also told employees, "[T]here is the door" and that they were free to leave. Employee Jones also credibly testified that employee Frison asked why it "would go against us," and, "if we were not going to get a raise, why would there be a review." Jones recalled further that Lamphier told them, "[W]e were not going to get anything and that if we did not like it then we could all leave, that he could replace the whole department." At the conclusion of Lamphier's remarks, the group indicated a willingness to perform the inventory and the meeting ended. It is axiomatic that the employees' discussion of working conditions and request for a pay increase to Lamphier at this meeting constituted the clearest form of protected concerted activity under the Act, and that therefore Lamphier's threatened economic and employment-related reprisals, *viz*, that their conduct would go against them in their pay reviews and the reference to replacing them because of those activities, the only basis shown by the record for such responses, was a violation of Section 8(a)(1) of the Act. I so find.

B. *April 9 and 10*

When Lamphier departed, Frison, C. Jones, Mitchell, D. Jones, and Thomas discussed Lamphier's responses among themselves, expressing resentment over Lamphier's statements and conduct generally. The group decided, in Frison's words, that whoever could come in on the following Saturday, April 7, to do inventory would come and if anybody had something else to do "we'd do that." Frison was out of town Friday and Saturday, but C. Jones, Thomas, and Mitchell worked. Also, deciding that, since Lamphier had talked to them that way and Respondent would be hurt if employees did not work Monday and Tuesday, April 9 and 10, the keypunch operators called in sick and did not report for work on those days.

C. *Employees' Decision To Quit on Wednesday, April 11*

After Elam asked Lamphier to do something on Tuesday, April 10, in light of the employees' obviously concerted action, suggesting he talk to them, Lamphier agreed to do so, and Elam contacted the employees through one of them by telephone asking them to return on Wednesday, April 11, for a meeting with Lamphier. The next morning, the employees clocked in at 8 a.m. and worked until 9 a.m. when Lamphier was available to see them. The employees gathered in the computer room where Lamphier apologized for losing his temper and left to respond to a call elsewhere. While absent, Lamphier's supervisor, Tom Nast, inquired about what had happened and after listening to a description of the events told the group that Lamphier should not have spoken to them angrily. When Lamphier returned, he asked if everything was straightened out, and, when one of the employees asked if there would be a raise, he said, "No." Lamphier told the employees that they could return to work. Upon returning to their department upstairs, the group discussed the events, some saying they could not work under such conditions, some noting the absence of any change in things, or Lamphier's attitude, and some expressing themselves as being too upset to work any further. As testified by Frison, in short, "We decided to quit," and they did so. Elam urged caution and further deliberation by the employees, but finally called Lamphier about the developments and was told to collect their badges and bring them downstairs. Instead, Lamphier and Tom Nast went upstairs and picked up the badges.

D. *Respondent's Refusal To Rehire the Former Keypunch Operators*

The parties stipulated that the keypunch operators quit on April 11, and Respondent admits that it decided against rehiring them afterward due to a company policy against doing so whenever an employee has left without notice, variously defined further by Respondent's witnesses as "proper notice" or as "two weeks notice." But Respondent argues further that neither Corene nor Delores Jones ever requested rehiring and that Barbara Thomas, who likewise made no such request, was also not an employee but rather held the status of an independent contractor. There is no dispute that Frison and Mitchell called Craig for their jobs on April 16, and were refused rehire—Frison being told it was out of the person's hands, and Craig simply being told "sorry." I further find that Corene Jones called in on the same day Frison called and was also refused rehire.

Regarding the issue raised by Respondent's allegation that Delores Jones and Thomas never asked to be rehired and thus were not refused reemployment, little more need be noted than that, in a meeting the week after the employees quit, when production matters were in a state of transition, which meeting was attended by Elam, Lamphier, and Respondent's corporate vice president, Thomas Cavendar, Respondent's own witness and admitted keypunch supervisor, Earline Elam, asked Respondent to put all the employees back to work. Elam testified, "Well, he [Cavendar] asked me what he could do for me. So I asked him could he get my girls back. And he told me that he cannot do that. He wished he could but he could not do that because the girls walked out and it was against the company policy to hire them back because they walked out like that." There is no room for any doubt in this record that Respondent knew that the keypunch operators—two of whom admittedly called in to request rehire, one who I find did so (Corene Jones), and two whose conduct in this regard is in dispute, but all of whom were named in the original charge dated April 16, 1979, and served upon Respondent which alleges that Respondent refused to reinstate them—had sought a return to work. It is not disputed that Respondent made no effort to countermand the decision not to rehire Elam's "girls" as communicated to Elam by Cavendar, and, lest there be any question remaining, there is also no indication that from at least the date of the charge there was no reasonable question for Respondent to now seriously urge that the employees had not communicated a desire to return to work after quitting. Had

there been any real question about the matter in Respondent's view of the events, it is reasonable to suppose Respondent would have inquired into the charge allegation in such limited regard, but it made no such effort. Since Respondent's division comptroller, Mike Craig, testified that the above-described meeting occurred late in the same week "that the girls called in," this would place the meeting wherein Cavendar denied Elam's request to rehire the employees as after April 16, the day Frison and the two others testified that they asked for their jobs back and the same day the charge was filed, which charge, I find, effectively communicated to Respondent that the keypunch operators had sought to return to work but alleged that they had been thwarted in those efforts. Based upon the foregoing, it is not within the realm of reasonable argument for Respondent to raise the thinly technical position that it did, in effect, not know that the two employees, Thomas and Delores Jones, wanted to return to their employment. I find that it did know, and further, in light of the above-described meeting, that any additional requests, other than what did occur, would have been futile—in short Respondent's argument is academic and without merit. I find regarding Mitchell, Frison, and Corene Jones that they asked for and were denied rehire on April 16 in calls to Mike Craig, and that D. Jones and Thomas were effectively denied rehire on April 19 (or 20), the date of the above-described meeting.

E. *Barbara Thomas' Status*

Except for an accommodation by Respondent with respect to Thomas' work schedule whereby she is allowed to leave early to work elsewhere, and the absence of fringe benefits or standard deductions in her compensation, Thomas' working conditions are identical with those of other admitted employees in the keypunch department. She receives the same rate of pay and works generally the same hours, doing the same work on the same equipment under the same immediate and overall supervision as other keypunch operators in the same office and with the same overtime work opportunities. The fact that Thomas "bills" Respondent for such work, signs in on a paper, and is paid out of a different account maintained by Respondent does not alter the fact that Respondent totally controls Thomas' work efforts and compensation. I find that Thomas does not occupy the status of an independent contractor in her employment relationship with Respondent, but rather is an employee with rights protected by the Act. She does not bear the earmarks of an independent entrepreneur with power to control her own profit and loss, but rather is employed in this capacity, I find, for the obvious economic convenience of her employer. *Avis Rent A Car System, Inc.*, 173 NLRB 1366, 1367 (1968); *R. L. Stott Company and R. L. Stott Heating and Air Conditioning Company*, 183 NLRB 884, 885 (1970); and *National Freight, Inc., Federal Freight, Inc., and Sun Transportation, Inc.*, 153 NLRB 1536, 1539 (1965).

F. *Respondent's Policy Defense*

Respondent urges that the employees were denied reemployment for the policy reason that they quit without notice and such action thereby prevented them from being considered for reemployment. Such position, however, is based upon a policy never reduced to writing, never communicated to the keypunch operator supervisor, Elam, and as to which only two examples—inapposite to the present case—out of 1,200 employees in 36 years were given. The flimsiness in the proof of such policy is further shown by the vagueness in details about how the policy works and what constitutes notice, as well as the fact that its prior enforcement is put into serious question by the fact that one of the keypunch operators was rehired the year before the incidents in this case arose although she had given only a few days' notice, while on vacation, that she would not be returning to work the following week. I find it revealing that Respondent was unable to prove the existence of such a policy prior to the occurrences in this case and that its attempts to do so were so meager in the respects noted above. I further find it revealing that, even were there to have been such a policy, it would not insulate unlawful conduct inasmuch as any employer policy penalizing employee exercise of rights guaranteed them under Section 7 of the Act would have to give way to the policies of the Act. That Respondent did not rely on such a "policy" seems to me to be borne out further by the fact that, given the dire need for operators and Respondent's having to "scrounge" around for employees when the former employees let it be known that they desired to return to work, something other than so illusory like a policy must have fueled Respondent's rejection of the employees' appeals for their work. Further substantiating this view is the fact that the employees involved had fine work records, free from any blemishes, and, in fact, had all been complimented by supervision for their good work. Elam herself described how the group had been praised, and given lunch, for filling in for Elam during the latter's absence from the department.

The only reason for Respondent's rejection of the keypunch operators' appeals emerging from the totality of considerations applicable herein, as described by Respondent's own witness, Elam, and noted above, as told to her by Cavendar, was because the employees "had walked out like that." This was in addition, I find, to their other efforts to improve working conditions described above. To cloak this unlawful response to employee concerted activity in the guise of a policy reason is unavailing, for Respondent, whether in the name of policy or as spontaneous retaliatory conduct, violated the Act by refusing the employees rehire because of their protected concerted activity, thereby further violating Section 8(a)(1) of the Act. Respondent's refusal to rehire the keypunch operators clearly "did not occur as the automatic result of an infraction of a clearly announced and universally enforced employment policy." *Speed-O-Lith Offset Co., Inc.*, 241 NLRB 928 (1979). It follows from this that the advanced "policy" reason was a transparent pretext, a finding which warrants the conclusion, when combined with the employees' clearly protected

activities, Respondent's knowledge thereof via Lamphier, Elam, Nast, Craig, and Cavendar, and its animus towards those activities, that a clear preponderance of the evidence supports this determination. *First National Bank of Pueblo*, 240 NLRB 184 (1979), and *Petropak, Inc.*, 238 NLRB 991 (1978).

CONCLUSIONS OF LAW

1. Pettibone Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. By threatening employees with reprisals because they engaged in protected concerted activities seeking to improve working conditions, Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.
3. By refusing to rehire Daisy Frison, Delores Jones, Corene Jones, Pandora Mitchell, and Barbara Thomas because they engaged in protected concerted activities seeking to improve working conditions, Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.
4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent violated Section 8(a)(1) of the Act, Respondent shall be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully refused to rehire Daisy Frison, Delores Jones, Corene Jones, Pandora Mitchell, and Barbara Thomas, the Order will provide that Respondent offer to each of them immediate and full reemployment to their former jobs or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges, and to make each of them whole for any loss of earnings they may have suffered as a result of the unlawful conduct against them by payment to them of a sum equal to that which each normally would have earned absent the unlawful conduct against them from the respective dates Respondent refused to rehire them to the dates of Respondent's offers of reemployment with backpay and interest computed in accordance with the Board's established standards set forth in *F. W. Woolworth Company*,[1] and *Florida Steel Corporation*.[2]

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[3]

The Respondent, Pettibone Corporation, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with reprisals because they engaged in protected concerted activities seeking to improve working conditions.

(b) Refusing to rehire Daisy Frison, Delores Jones, Corene Jones, Pandora Mitchell, and Barbara Thomas because they engaged in protected concerted activities seeking to improve working conditions.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Daisy Frison, Delores Jones, Corene Jones, Pandora Mitchell, and Barbara Thomas immediate and full reemployment to their former jobs or, if those jobs no longer exist, to substantially equivalent positions of employment, without prejudice to their seniority or other rights and privileges, and make each of them whole for any loss of earnings with interest thereon to be computed according to the formula described above in the section entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Chicago, Illinois, location copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 13, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

[1] 90 NLRB 289 (1950).

[2] 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[3] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT threaten employees that we will go against them in reviewing them for pay increases

if they engage in protected concerted activities seeking to improve working conditions.

WE WILL NOT threaten to replace employees in the keypunch operator department because employees there engage in protected concerted activities.

WE WILL NOT refuse to rehire Daisy Frison, Delores Jones, Corene Jones, Pandora Mitchell, and Barbara Thomas because of their protected concerted activities seeking to improve working conditions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL NOT offer the above-named immediate and full reemployment to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs, without loss of seniority or other rights and privileges, and WE WILL make each of them whole, with interest for any loss of earnings suffered by reasons of our unlawful conduct against them.

PETTIBONE CORPORATION